



Shade Manufacturers & Hotel Ltd v Mutuu; Gaciku; Wanjiru & Waithera (All legal representatives of the Estate of the Late JM Kangara) & another (Civil Suit 178 of 2020) [2023] KEHC 26098 (KLR) (Commercial and Tax) (24 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26098 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 178 OF 2020
FG MUGAMBI, J
NOVEMBER 24, 2023

BETWEEN

SHADE MANUFACTURERS & HOTEL LTD PLAINTIFF

AND

**SERAH MUTUU; GRACE GACIKU; VIRGINIA WANJIRU & LOUIS
WAITHERA (ALL LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
JM KANGARA) 1ST RESPONDENT**

**PETER MWANGI GATHOGO T/A DAYSTAR AUCTIONEERS 2ND
RESPONDENT**

RULING

1. This ruling determines the application dated 6th May 2022 filed by the 1st defendant. It is brought under the provisions of Order 25 rule 4 and Order 26 rule 1; of the *Civil Procedure Rules* 2010 and sections 1A,1B, 3 and 3A of the *Civil Procedure Act*. It seeks the following orders:
 - i. That there be stay of the proceedings in this case until such time as the plaintiff shall pay the costs awarded to the 1st defendants Ksh. 644,100/=; vide the certificate of taxation dated 22/1/2020 for the discontinued Petition, ELC. Petition No. 433 of 2018; Shade Manufacturers & Hotel Limited v Serah Mutuu & 3 Others;
 - ii. That the plaintiff does provide security for the whole of the costs to the 1st defendants in this case.
 - iii. That costs of this application be provided for.



2. The application is supported by the grounds on the face of it, a supporting and supplementary affidavit sworn by the 1st defendant's counsel, Rosemary Wangari Chege on 6th May 2022 and 6th July 2022 respectively and written submissions dated 21st October 2022.
3. The backdrop to this dispute is that for about three decades, the plaintiff had rented the 1st defendant's premises in Karen from the late J. M. Kangari, where it ran its hotel business popularly known as Shade Manufacturers and Hotel Limited. After the demise of the deceased, a dispute arose between the plaintiff and the personal representatives of the deceased, leading to a suit filed on 24th September 2004 through HCCC No. 1004 of 2004, which progressed to Business Premises Rent Tribunal (BPRT) Case No. 915 of 2015. Judgment was entered on 13th October 2017 and the plaintiff was condemned to pay costs which were taxed at Kshs. 1,048,300/=.
4. Thereafter, the plaintiff filed ELC Petition No. 433 of 2018 seeking to stop its eviction from the premises and claiming alleged compensation to the tune of Kshs. 42,000,000/= purportedly for improvements to the premises. The plaintiff discontinued the petition with costs to the 1st defendants which were again taxed at Ksh. 644,100/=.
5. The 1st defendant further avers that the plaintiff has filed many other cases over the same issue of termination of the tenancy and made serial applications seeking to stop its eviction from the premises besides these.
6. These were an application dated 15th December 2017 in ELCA No. 41 of 2017, which was dismissed with costs vide the ruling dated 10th July 2018; an application dated 16th July 2018 in CA Civ. App. No. 207 of 2018 Nai, which was dismissed with costs vide ruling dated 26th October 2018 and an application dated 25th October 2018 in CMCC Misc. App. No. 723 of 2018, which was dismissed with costs on 6th December 2018.
7. The 1st defendants contended that the plaintiff is yet to pay the costs in all these matters causing them apprehension that in the long run, the plaintiff shall not be in a position to compensate the defendants for the costs incurred. This was the gravamen of the application currently before the Court.
8. The application was opposed by the plaintiff who filed a Notice of Preliminary Objection dated 5th July 2022 and a supporting affidavit sworn by the plaintiff's counsel, Lawrence Oigoro Nyangito on the same date. The plaintiff also filed a replying affidavit to the application, sworn by the plaintiff's director, David Gitau Thairu on 14th October 2022 and written submissions on even date.
9. The plaintiff's main contention is that the instant application has been brought after unreasonable delay, after the close of pleadings and entry of summary judgment against the 2nd defendant and at a time when the hearing of the 1st defendant's case was meant to proceed. The plaintiff therefore avers that the application offends the mandatory provision of Order 26 rules 2 and 3 as well as the plaintiff's constitutional rights.
10. The court notes that the plaintiff filed this suit on 2nd June 2020 and the 1st defendant entered appearance and filed a defence on 8th July 2020. On 10th December 2021, the Court entered summary judgment against the 2nd defendant. The matter was scheduled to proceed to full hearing against the 1st defendant but the 1st defendant brought the instant application.
11. The plaintiff terms the application as baseless, incurably defective, incompetent and amounts to an abuse of court process and as an afterthought meant to mislead the court. It is the plaintiff's submission that the same ought to have been brought at the commencement of the pleadings.



Analysis

12. I have carefully considered the pleadings, rival submissions as well as the authorities cited by counsel in support of their depositions. The main issue for determination is whether the said application is merited.

13. I will first of all determine the preliminary objection. It is premised on Order 26 rule 2 which provides as follows:

“If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out the grounds of the defence together with a statement of the deponent’s belief in the truth of the facts alleged.”

14. The objective of the said provision must be understood within the context of protecting the defendant from:

“...situations in which he is dragged to court, and made to lose even the costs of litigation. It is also meant to prevent frivolous and useless litigation by persons... The balance to discourage useless litigation and provide access to justice by just claimants is the thin equilibrium that the court must strive to achieve.”

This was held in the case of [*Kibiumwiri Farmers Company Limited v Breeze Investments Company Ltd & 3 Others*](#), [2019] eKLR.

15. The plaintiff takes issue with the time when the application was filed. The plaintiff contended that the 1st defendant ought to have filed the application for security for costs before it filed its defence not at the juncture of hearing of the 1st defendant’s case. Further, the application was filed after the plaintiff had testified against the 2nd defendant and a partial judgment entered in its favour as against the 2nd defendant.

16. I am of the view that the provision does not in any way prescribe a mandatory time in the proceedings when an application for costs must be filed. More particularly, it does not prescribe that the application must be filed at the point of filing a defence. This is demonstrated by the use of the word if (the application is) made...before a defence is filled... The [*Oxford Languages Dictionary*](#) provides that the use of the word ‘if’ refers to ‘in the event that’. I therefore find that Order 26, rule 2 does not bar the filing of an application for security for costs after filing the defence.

17. In my understanding, the purport of the rule is that where an application for security for costs is filed before a defendant puts in their defence, the application ought to be accompanied by an affidavit demonstrating the grounds of the defence. In this case the application was made after the statement of defence had been filed. It only means that this being the case, the defendant was not required to file an affidavit stating their grounds of defence. It does not make the application defective. For these reasons the preliminary objection is devoid of merit.

18. That said, the application is brought under Order 25 rule 4, which provides as follows:

“If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.”



19. Order 26 rule 1 in turn provides as follows:

“In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.”

20. Granting an order for security is a matter of Court’s discretion and must therefore be exercised judiciously not on a whim or capriciously. I note that Order 26 rule 1 is again silent on the timelines when an application should be brought for security. I therefore take it that the Court’s decision ought to be made with due regard to the circumstances of each case.

21. The principles for consideration in an application for security for costs were pronounced in *Hall v Snowdon Hubbard & Co. (I)*, (1899) 1 QB 593, cited with approval in *Raw Bank PLC v Yusuf Shaa Mohamed Omar & another* [2020] eKLR, the learned Judge at page 594 stated as follows:

“The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made.”

22. The Court of Appeal in *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others*, Civil Appeal (Application) No. 38 Of 2013 [2014] eKLR, aptly elaborated that:

“In an application for security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful....

The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. In *Noormohamed Abdulla v Ranchhodbhal J. Patel & Another (1962) EA 448*, it was held that:

“The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties.”

23. Applying the above principles to the present case, the applicant relies on the history of events where the plaintiff has put all obstacles to avoid paying costs, which facts we have demonstrated from the costs so far awarded the 1st defendants that the plaintiff has defiantly refused to pay. I note that despite these averments, the only issue that is before this Court is the payment of costs with respect to ELC Petition No 433 pf 2018. The plaintiff attached a copy of a cheque made out to Sannex Enterprises Auctioneers. The cheque was in full settlement of the costs of Ksh. 644,100/= for the discontinued Petition being ELC Petition No. 433 of 2018.

24. The payment is admitted by the 1st defendant who submits that:

“...the said payment made past the application was only done because the plaintiff failed to secure orders to stay to pay costs, which fact is expressly admitted by the respondent



under paragraph 3(j) of the affidavit dated 14/10/2022. From the contents of the aforesaid paragraph, characteristic of the plaintiff, he could not pay the costs when ordered to do so, he engaged the 1st defendants and the court in serial litigation to evade paying costs until the wheels of justice drove him to pay when he could no more abuse the process of court to defy paying the costs.”

This prayer in the application is therefore overtaken by events.

25. As to whether the 1st defendants have made out a case for security for the whole of the costs to the 1st defendants in this case, I am not convinced that they have. No reason has been given as to why the application is made at this point in the proceedings. The testimony of the 1st defendants that the costs in other proceedings is yet to be paid should be taken with a pinch of salt. This is especially noting that the same allegation has been disproved by the plaintiff in this application.
26. I am also aware that there is increasing adoption of the jurisprudence that the discretion of the Court ought not to be exercised whimsically but in a manner that would not impede a party’s access to justice. The Supreme Court has pronounced itself clearly in the case of *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 Others*, (Petition 16 (E023) of 2021) [2023] KESC 11 (KLR).
27. Balancing the facts of this case against the requirements and considerations set out by the Supreme Court, it has not been proved that the plaintiff is not ordinarily resident in Kenya or that he had no sufficient property in Kenya. I also have serious doubts as to the genuineness of the proceedings and why the applicants would insist on proceeding with a prayer whose substance has been overtaken by events. Granting this order for security for costs may stifle the proceedings and impede access to justice which is not the aim of such an order.

Determination

28. In conclusion, for the reasons that I have stated, the preliminary objection herein fails. Further, the application dated 6th May 2022 is dismissed with costs to the plaintiff/ respondent. Parties shall proceed to fix a further hearing date to ensure that the matter is concluded expeditiously.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 24TH DAY OF NOVEMBER 2023.

F. MUGAMBI

JUDGE

